No. 84-1097

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In the Supreme Court of the United States

OCTOBER TERM, 1985

S. SIMCHA GOLDMAN, PETITIONER

v.

CASPAR W. WEINBERGER, SECRETARY OF DEFENSE, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS

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QUESTION PRESENTED

Whether the Free Exercise Clause of the First Amendment requires the Air Force to create an exception to otherwise applicable uniform regulations so that an Orthodox Jewish officer may wear a skullcap (or yarmulke) while on active duty.

PARTIES TO THE PROCEEDING

In addition to the parties listed in the caption of this case, the Secretary of the Air Force was named as a defendant in the district court and is a respondent in this Court.

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BRIEF FOR THE RESPONDENTS

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-20a) is reported at 734 F.2d 1531. The opinions on denial of rehearing en banc (Pet. App. 23a-27a) are reported at 739 F.2d 657. The opinion of the district court on the merits (Pet. App. 28a-34a) is unreported. The opinion of the district court granting petitioner's motion for a preliminary injunction is reported at 530 F. Supp. 12.

JURISDICTION

The judgment of the court of appeals was entered on May 8, 1984, and a petition for rehearing was denied on August 10, 1984 (Pet. App. 21a-27a). On November 1, 1984, the Chief Justice extended the time for fil-

ing a petition for a writ of certiorari to and including December 10, 1984 (Pet. App. 37a). On December 3, 1984, the Chief Justice again extended the time for filing a petition, to and including January 7, 1985 (Pet. App. 38a), and the petition was filed on that date. The petition was granted on June 17, 1985. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISION AND REGULATIONS INVOLVED

The First Amendment to the Constitution of the United States provides in pertinent part:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof * * *.

Air Force Regulation 35-10, ¶ 1-6, provides:

> Air Force members will wear the Air Force uniform while performing their military duties, except when authorized to wear civilian clothes on duty.

Air Force Regulation 35-10, ¶ 1-6.h(2) provides:

> Headgear will not be worn * * * [w]hile indoors except by armed security police in the performance of their duties.

STATEMENT

Petitioner S. Simcha Goldman is an Orthodox Jew who voluntarily joined the United States Air Force as a commissioned officer. In keeping with a practice and tradition of his religion, petitioner wears a head covering, usually a skullcap (or yarmulke), during waking hours. During the period at issue in this litigation, petitioner was on active duty at March Air Force Base in Riverside, California, serving as a clinical psychologist. Air Force Regulation (A.F.R.) 35-10 (July 18, 1980), which prescribes the official Air Force uniform, provides that "Air Force members will wear the Air Force uniform while performing their military duties" and that, with

exceptions not relevant here, "[h]eadgear will not be worn * * * [w]hile indoors" (A.F.R. 35-10, ¶¶ 1-6 and 1-6.h(2)).

In May and June of 1981, petitioner was ordered to cease wearing a yarmulke while in uniform. Petitioner refused to comply with his commander's order, and he was reprimanded. Petitioner then filed this suit in the United States District Court for the District of Columbia, challenging the application to him of A.F.R. 35-10 on First Amendment grounds and seeking damages and injunctive relief. The district court held that A.F.R. 35-10 was unconstitutional as applied to petitioner's desire to wear a yarmulke with the Air Force uniform. The court of appeals reversed.

A. The Air Force's Dress And Appearance Standards.

"The Air Force is a uniformed service," and "uniform wear greatly enhances the esprit de corps essential to an effective military force." A.F.R. 35-10, ¶ 1-1.a. The Air Force uniform is mandatory for all personnel on duty: "Air Force members will wear the Air Force uniform while performing their military duties, except when authorized to wear civilian clothes on duty." A.F.R. 35-10, ¶ 1-6. The Air Force uniform requirements are set forth in A.F.R. 35-10, a 190-page regulation that describes in minute detail all of the various items of apparel that constitute the Air Force uniform.[1] The regulation specifies and describes every garment that may be worn as a part of or with the uniform, and it provides mandatory instructions covering every subject from undergarments to the carrying of umbrellas. Air Force personnel may not add to or subtract from the prescribed uniform. A.F.R. 35-10, ¶ 1-6.f. The only individualized options authorized by A.F.R. 35-10 relate to certain items of jewelry and hair styles. Even with respect to these options, however, A.F.R. 35-10 specifies certain limitations. Facial

[1] We have lodged a copy of A.F.R. 35-10 with the Clerk of the Court.

hair, for example, is limited to mustaches, the corners of which may not extend beyond the mouth,[2] while men's jewelry is limited to rings and "neat and conservative" identification bracelets. A.F.R. 35-10, Table 1-1, line 16, and ¶ 1-12.b(1)(b).

A.F.R. 35-10 is, as in all other respects, extremely detailed on the subject of headgear. See, *e.g.*, A.F.R. Table 2-1, lines 12 and 13, ¶¶ 2-5.j, 4-3.c, 4-11, 4-13, and 4-14.a. With limited exceptions, the regulation directs that authorized headgear shall be worn only out of doors. A.F.R. 35-10, ¶ 1-6.h. In particular, the regulation provides that "[h]eadgear will not be worn * * * [w]hile indoors except by armed security police in the performance of their duties." A.F.R. 35-10, ¶ 1-6.h(2)(f).[3]

The mission of the Air Force, of course, is to "defend[] this nation against our enemies" by "conducting combat operations" (J.A. 31). At trial, Air Force

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[2] Beards are permitted only when authorized by a commander on the advice of a medical officer. A.F.R. 35-10, Table 1-1, line 1. This exception recognizes that not shaving is the accepted medical treatment for Pseudofolliculitis Barbae (ingrown facial hairs). Exemptions granted for the treatment of this condition are temporary (generally not in excess of 90 days) and, as such, do not constitute authorization for a permanent change in appearance standards. J.A. 24.

[3] An exception to this requirement may be authorized during military religious ceremonies; in such instances, the chaplain conducting the military religious ceremony is to provide guidance concerning the wearing of headgear. A.F.R. 35-10, ¶ 1-6.h(2)(d). No other deviations from the prescribed uniform are authorized for Air Force personnel whose religious practices include the wearing of special apparel.

However, Department of Defense Directive 1300.17 (June 18, 1985) authorizes commanders, in their discretion, (1) to designate living quarters in which religious articles may be worn with the uniform when such wear will not adversely affect unit cohesion, (2) to permit chaplains to wear the religious accoutrements of their faith in the performance of worship, and (3) to allow servicemembers to wear religious items that are not visible or otherwise apparent when worn with the uniform. See pages 14-15, *infra*.

witnesses explained why the extraordinarily detailed regulation of the official uniform worn by its personnel is deemed essential to the accomplishment of the Air Force's mission. Fundamental to the development of an effective combat force is a combination of teamwork, motivation, discipline, esprit de corps, and image (J.A. 32-33). To be successful in combat, soldiers must be trained to subordinate willingly and instinctively their personal preferences and interests in favor of the overall group mission (J.A. 33, 37). Major General William R. Usher, the Director of Personnel Plans at Air Force Headquarters, testified that "one of the most effective ways" of accomplishing the group mission is "that you put people in the same uniform; you standardize; you require them to be part of that organization, be part of that team which has been designed and put together as an effective combat unit" (J.A. 37). General Usher further explained that the standardized uniform encourages Air Force personnel to think of themselves in terms of their military obligations and serves to deemphasize the individual preferences and beliefs that may have divided soliders in civilian life: "Uniformity of dress, except for distinctions of rank, promotes the teamwork necessary for effective completion of the mission"; "[d]iscipline of enlisted personnel would be undermined if a departure [from the uniform regulation] is permitted [for] an officer"; and "[u]niform standards of dress engender pride and thus further the mission of the Air Force" (Pet. App. 30a; see also J.A. 35-39). Thus, the considered, professional judgment of the Air Force is that allowing "[d]eparture[s] from the uniformity standards of AFR 35-10 * * * would adversely affect the promotion of teamwork, counteract pride and motivation, [and] undermine discipline and morale" (Pet. App. 30a-31a).

Captain Reeves, an Air Force chaplain assigned to Maxwell Air Force Base, also testified at trial concerning a study prepared for the Army that describes, inter alia, the dress and appearance requirements and customs

of a number of religious groups. For example, Captain Reeves testified (J.A. 73-74) that male members of the International Society of Krishna Consciousness are required to wear tufts of hair, called sikhs, and that they place distinctive clay markings on their face, including "two parallel white lines that run from the forehead to the bridge of the nose." Other requirements noted by Captain Reeves were saffron robes for monks in the Satchidananda Ashram-Integral Yoga group, an Islamic prohibition against the wearing of clothes by males that show the imprint of the body and an Islamic requirement that females show only the face and hands and that portion of the body below the ankles. Yet another group requires its adherents to keep all of their hair, including their beards, and to wear a steel bracelet and a dagger. J.A. 74-75.

B. Petitioner's Experience In The Military.

Petitioner testified that a custom followed by some, but not all, devout Orthodox Jewish males is the wearing of a yarmulke (J.A. 200).[4] Yarmulkes are skullcaps that vary in size, color, and degree of ornamentation. The purposes of wearing a yarmulke, according to rabbinical authorities relied upon by petitioner, are both religious and cultural: "First, [wearing a yarmulke] was the Jewish way of showing reverence and respect. Secondly, uncovering the head was the custom of the Gentiles * * *.

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[4] Although petitioner's brief (at 5) suggests that the wearing of a yarmulke is required by Jewish law, he did not so testify at trial, and authorities introduced in the district court clearly demonstrate otherwise. See 1 G. Appel, *The Concise Code of Jewish Law* 34 n.3 (1977) (J.A. 261):

> Wearing a head covering as a sign of humbleness and reverence before God is a revered tradition in Judaism and a token of Jewish identity. One is nevertheless permitted, especially where one's livelihood is involved, to accept employment in a position where he will be required to go bareheaded, inasmuch as covering the head is prescribed by custom but is not demanded by law.

Covering the head thus served as a means of identification and a barrier against assimiliation" (J.A. 228).

From 1970 to 1972, petitioner served as a chaplain in the United States Navy. During that time, he wore his yarmulke without incident. J.A. 156-157.[5] In 1972, petitioner decided to study clinical psychology in graduate school. He "needed some funding" and therefore applied for and was accepted into the Armed Forces Health Professions Scholarship Program. J.A. 158-159. Under this program, petitioner was placed on inactive reserve status in the Air Force while he studied clinical psychology at Loyola University of Chicago. During his three years in the scholarship program, petitioner received a monthly stipend and an allowance for tuition, books, and fees. 10 U.S.C. 2120-2127; A.F.R. 36-17 (~~July 20, 1977~~ FEB. 1 1973). Participants in the program are required to serve a minimum of one year of active duty for each year of subsidized education. 10 U.S.C. 2123. Accordingly, in September 1977, after receiving his Ph.D. in clinical psychology, petitioner was assigned to active duty at the Mental Health Clinic at March Air Force Base Regional Hospital, near Riverside, California (Pet. App. 28a).

Petitioner continued his practice of wearing a yarmulke after entering on uniformed active duty with the

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[5] With the possible exception of time spent actually conducting religious services, petitioner's conduct was in violation of Navy regulations, which have always been comparable to the Air Force regulation at issue in this case. We note, however, that petitioner's tour of duty with the Navy roughly coincided with the tenure of Admiral Elmo Zumwalt as Chief of Naval Operations. Admiral Zumwalt sent a number of messages, commonly referred to as "Z-grams," to all Navy personnel; one such message (Z-57 (Nov. 1970)), while not dealing specifically with religious apparel, was widely interpreted by Navy personnel as authorizing a general relaxation of dress and appearance standards (see pages 37-38, *infra*). Because Z-57 was merely a "message" from the CNO, rather than a regulation, it was never formally rescinded, but, to the extent that it may have been misinterpreted as sanctioning petitioner's deviation from Navy regulations, it did not then, and does not now, represent Navy policy.

Air Force. However, petitioner kept a "low profile" on the base (J.A. 15). He rarely left his duty station in the clinic, did not take his meals in the hospital cafeteria, and wore his regulation service cap over his yarmulke when traveling to and from work (*ibid.*). Nevertheless, petitioner's superiors did receive occasional complaints about his violation of the uniform regulation. In response to the first such complaint, in 1978, the then-commander of the hospital was advised by the Surgeon General that the decision whether to take any action was up to the commander. The commander decided not to confront petitioner over the issue. *Ibid.* When a new commander took charge of the hospital in 1980, he questioned petitioner's violation of the uniform regulation, but, upon learning that his predecessor had permitted it, he too decided not to confront petitioner "at that time." *Ibid.*

In April 1981, however, petitioner appeared to testify as a witness at a formal court-martial wearing a yarmulke with the Air Force uniform. The circuit trial counsel registered a complaint about the incident. In response, the hospital commander consulted with his wing commander and others and learned that the wearing of a yarmulke, while a "highly recommended and encouraged" practice, is not required by Orthodox Judaism. J.A. 18. The hospital commander then called petitioner to his office and informed him that wearing religious garb in addition to the uniform was a violation of Air Force regulations. In an attempt to reach a mutually acceptable accommodation, the commander told petitioner that he could continue to wear his yarmulke when he was in the hospital, but that he would have to conform to uniform requirements in any of the other buildings on the base. J.A. 167-169.

Although virtually all of his time on the base was spent in the hospital (J.A. 205), petitioner rejected the proffered accommodation and informed his commander that he would continue to wear his yarmulke as he saw fit (J.A. 169). Attempts to settle the controversy having

failed, the hospital commander issued a written order on June 23, 1981, in which he directed petitioner to refrain from wearing religious garb while in uniform. This order pertained to the entire base and did not make an exception for hospital duty (J.A. 207). Petitioner refused to acknowledge receipt of the order and continued to wear his yarmulke (*ibid.*). The next day, the hospital commander issued petitioner a letter of reprimand for misconduct, stating that petitioner's actions "represent[ed] a flouting of military authority and [would] not be tolerated" (J.A. 208). In addition, the hospital commander withdrew a previously-issued recommendation that petitioner's tour of active duty be extended (J.A. 212-213).[6] This litigation followed.

C. The Decisions Below.

Petitioner filed suit in the United States District Court for the District of Columbia, challenging the application of A.F.R. 35-10 on First Amendment grounds and seeking damages and injunctive relief. The district court granted petitioner's motion for a temporary restraining order and later for a preliminary injunction to prohibit the Air Force from enforcing A.F.R. 35-10 to prevent him from wearing his yarmulke while in uniform during the pendency of the litigation. 530 F. Supp. 12 (1981).

After a trial on the merits, the district court acknowledged that the Air Force regards the uniform regulation as essential to the accomplishment of its military mission and that this military judgment is "based upon the experience of the Air Force in times of peace and in times of war" (Pet. App. 31a). Nevertheless, the district

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[6] Petitioner himself no longer wishes to extend his tour of active duty (J.A. 182). He is currently on inactive reserve status. In a separate lawsuit that has been stayed pending the outcome of this case, petitioner is challenging the denial of his application for active reserve status. *Goldman* v. *Sec'y of Defense*, No. 81-3197 (D.D.C. filed Dec. 31, 1981).

court rejected the professional military judgment of the Air Force on the ground that it was not "the product of an empirical study, psychological survey or the like" (*id.* at 33a). Without any studies of its own, the district court further concluded that making religious exceptions to the uniform regulation would "dissipat[e] hostility" and render the Air Force a "more humane institution" (*id.* at 31a). Accordingly, the district court entered a permanent injunction in favor of petitioner (*id.* at 35a).

The court of appeals reversed (Pet. App. 1a-20a). The court first recognized that the Air Force's judgment concerning the importance of maintaining uniform standards of appearance "was in the area of military governance, on which [the Air Force's] expertise is high and on which judicial competence is low" (*id.* at 16a). Accordingly, the court concluded that a high degree of deference was due the Air Force's judgment (*ibid.*). On the merits, the court noted that the particular type of uniform headgear chosen by the Air Force—for example, its shape and color—was necessarily arbitrary, but the court recognized that "enforcement of rules that certain hats may be worn only by certain people or at certain times serves the military purposes of identification and indoctrination into instinctive obedience" (*id.* at 19a). The court therefore refused to require the Air Force to permit religious exceptions to its uniform regulation out of deference to the Air Force's judgment that such exceptions would negate the benefits of strict uniformity and also would incur the resentment of servicemembers compelled to comply with the regulation in all respects (*id.* at 19a-20a).

D. Post-Litigation Proceedings.

On October 19, 1984, after the court of appeals denied petitioner's request for rehearing, Congress directed the Secretary of Defense to establish a study group "to examine ways to minimize the potential conflict between

the interests of members of the Armed Forces in abiding by their religious tenets and the military interest in maintaining discipline." Department of Defense Authorization Act, 1985, Pub. L. No. 98-525, § 554(a), 98 Stat. 2532. The Act directed the Secretary, within 20 days of receipt of the report, to issue "appropriate implementing policy" (§ 554(d), 98 Stat. 2532).

Pursuant to this legislation, the Secretary formed the Joint Service Study Group and invited comments from the interested public. 49 Fed. Reg. 48596 (1984). The Study Group was directed to "address the issues of compliance with and modifications of uniform regulations, dietary restrictions, sabbath observance, and facial and body hair length practices," and to "consider the views of a broad spectrum of religious organizations and specialists outside the government." *Ibid.* The Secretary charged the Study Group, which was composed of the Chiefs of Chaplains of each of the Military Departments and a line officer from each service, with the task of "articulat[ing] an approach to these sensitive issues that will maximize morale and discipline as well as the opportunity for exercise of freely held religious beliefs by members of the Armed Forces." *Joint Service Study on Religious Matters*, App. B at A4 (Mar. 1985) [hereinafter cited as *Joint Service Study*].[7]

The Study Group's final report confirmed and expanded upon the conclusions expressed by the Air Force at trial in this case.[8] Based upon its investigation, the

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[7] We have lodged a copy of the *Joint Service Study* with the Clerk of the Court.

[8] Although the Study Group conducted extensive research, its final report recognized what the district court refused to acknowledge--that no "empirical study, psychological survey or the like" (Pet. App. 33a) can determine conclusively the potential impact on the military of exceptions to the uniform regulations. Instead, the "consensus among professional social scientists was that, in determining whether to recommend exceptions to dress and appearance, the Group must rely on 'institutional wisdom' evolved over years of

Study Group reported that "[c]ontemporary research in the social and behavioral sciences supports what military institutions have recognized for centuries: dress and appearance define who we are and what we are to ourselves and to others. Within the military such identification contributes significantly to building discipline, individual morale, unit cohesion, and service esprit de corps." *Joint Service Study*, at III-4.

Because of the unique character of the military mission, the Study Group concluded that the uniformed, military services cannot tolerate the variety of dress and appearance that characterizes civilian society. The Study Group reasoned that soldiers must be ready, without hesitation or discussion, to risk their lives on command. The degree of discipline that makes such instinctive obedience possible must, for the most part, be instilled in civilians who enter upon military service. *Joint Service Study*, at III-6 to III-7, III-9, III-17. The Study Group concluded that the military services' "extreme emphasis on uniformity" is a critical element in effecting this "rite of passage" from civilian to military society. *Id.* at III-7. As the Study Group explained (*id.* at III-4 to III-5 (citations omitted)):

> Wearing common uniforms induces the wearers to view themselves as part of a group larger than themselves. It is "a way of converting individuals and their feelings about themselves . . . from individuals into members of a . . . group." Uniformity not only directly imposes the discipline of the group, but, more subtly, instills the *self*-discipline necessary for the military member to perform effectively. In the course of this outward display of group membership, the individual servicemember develops a willingness to submit his or her individuality to the larger organization and thus thinks and acts differently.

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military experience combined, where possible, with such guidance as the social sciences might suggest." *Joint Service Study*, at III-8 to III-9.

> Another purpose of uniform dress and appearance is to reinforce the idea that military members *are* different from civilians—that their role is * * * "qualitatively different" from that of their civilian counterparts. Uniforms remind the men and women who wear them that they put aside certain personal freedoms when they joined the armed forces and that they have assumed special obligations inherent in the military's responsibility for the nation's defense. * * *
>
> At the same time uniforms set military people apart from civilians, they act as a cohesive bond within the services by instilling a common identity, by providing visual evidence of shared experience, and by reinforcing a sense of tradition. This group identification plays an essential role in the development of unit cohesion and institutional esprit de corps, which in turn contribute to military effectiveness.[9]

Mindful of its charge, the Study Group nevertheless considered the possibility of allowing religious exemptions to uniform requirements. The Study Group considered a range of options, including authorization for the wearing of so-called "unobtrusive" articles of religious apparel. The Study Group's conclusions confirmed the testimony of military professionals in the district court that such exceptions would undermine military effectiveness by tending to reinforce the individual's sense of being separate and distinct from the military and its purposes. *Joint Service Study*, at III-9. The Study Group also noted other serious problems with any policy that would permit the wearing of "unobtrusive" articles of religious apparel (*id.* at III-20 to III-21):

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[9] The Study Group's conclusions were bolstered by the results of polls conducted among more than 2,700 resident Professional Military Education students, including commissioned and non-commissioned officers. Of those surveyed, 88.5% thought that allowing exemptions for visible religious apparel would cause a very negative or negative impact on military effectiveness. Only 3.6% thought the impact would be positive or very positive. *Joint Service Study*, App. E, at A36.

> In an effort to accommodate the greatest number of people, the Study Group did consider the wear of "unobtrusive" articles (such as head coverings) and grooming exceptions (e.g., beards) away from hazardous areas. Such an option raised several questions. The first was how the services might determine what constituted "unobtrusive." Given the eclectic composition of the American military, what would be unobtrusive to some would be glaringly obvious to others. In addition, any exception to the norm would be viewed as precisely that: an exception by individuals who were putting personal considerations before the group. To allow some exceptions and not others would create the impression, indeed the reality, of favored treatment for selected faith groups. In addition to the impact of this inequity on cohesion and esprit, such an approach would raise legal questions as well.

Despite these problems, the Study Group recognized the responsibility of the Armed Forces to meet the religious needs of its members whenever possible. Accordingly, the Study Group recommended that servicemembers should be permitted to wear *non*-visible items of religious apparel with the prescribed uniform and that visible items of religious apparel generally should be permitted in the relative privacy of a soldier's living quarters. *Joint Service Study*, at III-21.

These recommendations were adopted for all Military Departments in Department of Defense (DoD) Directive 1300.17 (June 18, 1985).[10] The Directive allows commanders, in their discretion, to make limited exceptions from the uniform regulations for religious reasons. The Directive provides in pertinent part as follows:

> 1. * * * The Department of Defense places a high value on the rights of service members of the Armed Forces to observe the tenets of their respective religions. It is DoD policy that requests for accommo-

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[10] We have lodged a copy of this Directive with the Clerk of the Court.

dation of religious practices should be approved by commanders when accommodation will not have an adverse impact on military readiness, unit cohesion, standards, or discipline.

2. The following goals are to be used by the Military Departments in the development of guidance on the exercise of command discretion concerning the accommodation of religious practices. * * *

* * * * *

b. The Military Departments should designate living spaces in which religious articles may be worn with the uniform when wear will not affect adversely unit cohesion;

c. Chaplains may wear religious accouterments with the uniform in the performance of worship and practices distinct to their faith group;

d. Subject to safety and health requirements, any religious item not visible or otherwise apparent may be worn with the uniform.

SUMMARY OF ARGUMENT

I. A. In support of his argument that the Air Force is required to grant him an exemption from A.F.R. 35-10, petitioner urges this Court to apply the "compelling governmental interest" and "least restrictive alternative" mode of analysis developed for Free Exercise claims in the civilian sector. See, *e.g.*, *Thomas* v. *Review Board*, 450 U.S. 707 (1981). But civilian precedents such as *Thomas* have no applicability in the military context. This Court has consistently recognized that the military is a separate community "without counterpart in civilian life" (*Schlesinger* v. *Councilman*, 420 U.S. 738, 757 (1975)) and that, when the needs of the military so require, activities that are likely adversely to affect military interests may be regulated, even though the same activities, when engaged in by civilians, would be entitled to constitutional protection. See, *e.g.*, *Brown* v. *Glines*, 444 U.S. 348 (1980); *Parker* v. *Levy*, 417 U.S. 733 (1974).

The divergence between military and civilian society is at its sharpest in areas relating to the panoply of First Amendment rights that guarantee citizens the liberties essential to a self-governing people. Unlike civilian society, a " 'military organization is not constructed along democratic lines and military activities cannot be governed by democratic procedures * * *.' " *Greer* v. *Spock*, 424 U.S. 828, 843-844 (1976) (Powell, J., concurring) (quoting T. Emerson, *The System of Freedom of Expression* 57 (1970)). To the contrary, soldiers are expected to obey the directives of their superiors without question or hesitation, even when those orders may severely compromise a soldier's personal safety or comfort. And unswerving obedience to command arises not from rational discussion or conviction, but from discipline. A healthy respect for these unique needs of the military has led this Court to apply a different standard of review to constitutional challenges raised by military personnel than is applicable in the civilian context.

Although the Court has not attached a label to the standard of review it employs in military cases, *Brown* v. *Glines*, *supra*, most clearly exemplifies the prevailing approach. There, the Court engaged in no balancing, no weighing of interests, in concluding that "[s]peech *likely to interfere* with [the] vital military prerequisites [of loyalty, morale, and discipline] for military effectiveness * * * can be excluded from a military base" (444 U.S. at 354 (emphasis added)). The only caveat added by the Court was that expression should be regulated no more than is "reasonably necessary" to protect the substantial governmental interests at stake (*id.* at 355).

B. In addition to the special nature of military society, there is another factor that must inform the Court's review of petitioner's claim to a religious exemption from the Air Force's uniform regulation. In assessing the need for a particular regulation promulgated to establish and maintain a disciplined and well-ordered fighting force, the courts must accord great deference to

professional military judgments. See, *e.g.*, *Chappell* v. *Wallace*, 462 U.S. 296, 300-301 (1983); *Orloff* v. *Willoughby*, 345 U.S. 83, 93-94 (1953). This deference is rooted partly in the express constitutional commitment of the governance of the nation's Armed Forces to the President and Congress and partly in the inability of civilian judges to determine the impact upon discipline that judicial second-guessing of command decisions might occasion. See, *e.g.*, *Gilligan* v. *Morgan*, 413 U.S. 1, 10 (1973).

C. This case involves a determination made by military professionals concerning the training of military personnel. It is the considered judgment of those military professionals that regulations dictating uniformity of dress will instill the discipline, morale, and esprit de corps essential to the accomplishment of the military mission—to protect the security of this nation. Consistent with established limits on judicial review of such military decisions, this Court's role is, first, to determine whether it is "likely" that exceptions to the military's uniform requirements will interfere with the military interests advanced by the Air Force. If so, the Court must also determine whether the scope of the uniform regulation is "reasonably necessary" to achieve those interests. *Brown* v. *Glines*, *supra*.

II. A. There can be no serious doubt that uniform dress and appearance standards serve the military interest of maintaining discipline, morale, and esprit de corps. In *Kelley* v. *Johnson*, 425 U.S. 238 (1976), the Court rejected a First Amendment challenge to a police department's dress and appearance code, noting that the "overwhelming majority" of police departments have uniform requirements and that such requirements serve the legitimate purpose of inculcating the esprit de corps deemed necessary for an effective police force. If uniformity serves to inculcate discipline, morale, and esprit de corps in police departments, if follows a fortiori that uniformity serves the same purposes in the nation's "uni-

formed services." This conclusion is supported by virtually all professional military personnel, by centuries of military experience in this and other countries, by civilian social scientists, and by common sense. Indeed, petitioner conceded as much in the court of appeals, and he has not argued otherwise in this Court.

This concession is fatal to petitioner's argument that the only interest of the Air Force in enforcing its uniform regulation is enforcement itself. Rather, enforcement is a necessary means to the undeniably critical end of molding soldiers into an effective fighting force. It is thus clear that exceptions to the Air Force's uniform dress and appearance standards are "likely to interfere" with the military interest in maintaining discipline, morale, and esprit de corps.

B. It is equally clear that the scope of the Air Force's uniform regulation is reasonably necessary to protect the military interests at stake. Petitioner argues that the regulation is overbroad and that the military interests in discipline and morale could be met even if he were allowed to deviate from the regulation. But petitioner's arguments amount to precisely the sort of second-guessing of professional military judgments that this Court has refused to countenance in the past.

For example, petitioner characterizes the yarmulke as an " 'unobtrusive' * * * benign religious observance" that, in today's society, is no more than "slightly idiosyncratic apparel" (Br. 9 (citation omitted)). We agree that, in civilian society, the wearing of a yarmulke is not generally an occasion for comment. But in the military, the smallest departure from the uniform dress code *is* an occasion for comment. It sets the wearer apart from his fellow soldiers and serves as a public assertion of individuality in a context in which cohesion and group identity are essential.

Like the district court, petitioner also challenges the Air Force regulation because it was not the product of a "scientific study" (Br. 25). The short answer to petitioner's argument is that the military is not constitu-

tionally required to perform "clinical" or "empirical" studies before it may enforce a personnel regulation. The military itself is a profession, and its institutional judgments, especially those relating to discipline and morale, have been refined by centuries of practical experience. Those judgments possess independent dignity and are entitled, within their sphere, to more respect than the speculations of members of other professions unacquainted with the peculiar constraints of military life.

Petitioner further argues that granting the exemption he seeks would have no adverse consequences for military discipline and morale because, for a period of years, no one objected to his wearing a yarmulke. Petitioner's assertion is factually inaccurate. But more important, the military need not demonstrate in each individual case that a departure from uniform standards has caused a breakdown in discipline and morale before it may enforce its regulations.

Finally, petitioner's argument, accepted by the district court, that exceptions to the uniform requirement would make the Air Force a "less rigid, more humane institution" (Pet. App. 31a) is totally beside the point. Moreover, it is difficult to imagine a judgment more outside the realm of judicial competence than the degree of "ridigity" and "humanity" appropriate to a Military Department.

III. Acceptance of petitioner's argument would create the further difficulty of forcing the military to choose between virtual abandonment of its uniform regulations and constitutionally impermissible line drawing. Petitioner's case is but one of many in which members of the Armed Forces have sought a religious exemption from the uniform requirement in order to wear turbans, unshorn hair, beards, swords, ankle length skirts, dreadlocks (long, braided hair), and kum kums (red dots worn on the forehead). Litigation over such requests has become increasingly frequent and, if petitioner's claim were accepted, could only be expected to increase.

The military would have no principled basis upon which to grant petitioner's request while denying others. Granting some religious exemptions to the uniform requirement but not others would undermine military morale and, indeed, would raise substantial Establishment Clause concerns. On the other hand, if the military were obliged to grant all exemptions claimed on religious grounds, it takes no great leap of imagination to picture a rag-tag band of soldiers bearing no resemblance to a "uniformed service."

ARGUMENT

THE FREE EXERCISE CLAUSE DOES NOT REQUIRE THE MILITARY TO GRANT RELIGIOUS EXEMPTIONS TO UNIFORM DRESS AND APPEARANCE REQUIREMENTS

A. The Standard For Evaluating Free Exercise Challenges In The Civilian Sector Has No Applicability In The Military Context.

The most striking aspect of petitioner's case in this Court is his unwillingness to acknowledge that his claim arises in the special context of a challenge to the military's authority over the conduct of its members.[11] Virtually all of petitioner's arguments are premised on the contention that the Court should analyze his claim under the standards enunciated in cases such as *Thomas* v. *Review Board*, 450 U.S. 707 (1981); *Wisconsin* v. *Yoder*,

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[11] Petitioner's brief is also noteworthy for its singular focus on the Air Force. While that is of course the particular Military Department out of which this case arises, *all* of the uniformed services have dress and appearance regulations comparable to A.F.R. 35-10. See A.R. 670-1 (Army); NAVPERS 15665C (Navy); MCOP-1020-34C (Marine Corps); and CG-471 (Coast Guard). The Court's decision in this case will apply to the regulations of all of the uniformed services. Moreover, all of the Military Departments are now subject to DoD Directive 1300.17 (see pages 14-15 *supra*), and that Directive does not provide for the type of accommodation that petitioner seeks.

406 U.S. 205 (1972); and *Sherbert* v. *Verner*, 374 U.S. 398 (1963). See, *e.g.*, Pet. Br. 12, 16, 20, 24-29. But these civilian precedents have no applicability in the military context. While we do not here contend that petitioner's challenge to A.F.R. 35-10 is totally unreviewable,[12] we do submit that judicial review of constitutional challenges to military regulations is *sui generis*. This Court has consistently recognized that military interests in discipline and morale are of paramount national importance and that activities that are likely to have adverse effects on those interests may be regulated, even though the same activities, when engaged in by civilians, would be entitled to constitutional protection. See, *e.g.*, *Brown* v. *Glines*, 444 U.S. 348, 354-357 (1980); *Parker* v. *Levy*, 417 U.S. 733, 758 (1974).

The reason that military personnel lack the same degree of constitutional protection afforded to civilians is a direct consequence of the fundamental distinctions between military and civilian society. "While the members of the military are not excluded from the protection granted by the First Amendment, the different character of the military community and of the military mission requires a different application of those protections." *Parker* v. *Levy*, 417 U.S. at 758; accord *Rostker* v. *Goldberg*, 453 U.S. 57, 67 (1981) (Due Process Clause "tests and limitations * * * may differ because of the military context."); Hirschhorn, *The Separate Community: Military Uniqueness and Servicemen's Constitutional Rights*, 62 N.C. L. Rev. 177, 201 (1984) ("[A]s a matter of

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[12] But see, *e.g.*, *Khalsa* v. *Weinberger*, 759 F.2d 1411 (9th Cir. 1985), pet. for reh'g pending (dismissing as unreviewable the Army's refusal to permit a Sikh to enlist because he would be unable to comply with the Army's uniform regulations and noting that seven other circuits have adopted the test for nonreviewability of certain military decisions first articulated in *Mindes* v. *Seaman*, 453 F.2d 197 (5th Cir. 1971); see also Folk, *Military Appearance Requirements and Free Exercise of Religion*, 98 Mil. L. Rev. 53, 75-76 & nn. 142-147 (1982) (discussing nonreviewability of certain military decisions).

observation and history, the armed forces are a distinct subculture in which the individual is subordinated to the organization in a manner unlike any other government activity.").

Moreover, the divergence between military and civilian society is at its sharpest in areas relating to the panoply of First Amendment rights that guarantee citizens the liberties essential to a self-governing people. Unlike civilian society, a " 'military organization is not constructed along democratic lines and military activities cannot be governed by democratic procedures * * *. [M]ilitary decisions cannot be made by vote of the interested participants.' " *Greer* v. *Spock*, 424 U.S. 828, 843-844 (1976) (Powell, J., concurring) (quoting T. Emerson, *The System of Freedom of Expression* 57 (1970)). To the contrary, soldiers are expected to obey the directives of their superiors without question or hesitation, even when those orders may severely compromise a soldier's personal safety or comfort. As the Court stated in *In re Grimley*, 137 U.S. 147, 153 (1890):

> An army is not a deliberative body. * * * Its law is that of obedience. No question can be left open as to the right to command in the officer, or the duty of obedience in the soldier.

Unswerving obedience in extreme circumstances arises not from rational discussion and conviction, but from discipline: "[The accomplishment of the military mission implies] the fundamental necessity for obedience, and the consequent necessity for imposition of discipline." *Parker* v. *Levy*, 417 U.S. at 758. Without this discipline and obedience, an effective military organization could not be maintained, and the existence of other civil liberties, and the State itself, could be jeopardized. For these reasons, the Court has recognized that the full ambit of constitutional protections is not compatible with the maintenance of a military organization and that the special requirements of the military "may render per-

missible within the military that which would be constitutionally impermissible outside it." *Ibid.* See generally Hirschhorn, *supra*, 62 N.C.L. Rev. at 177.

Although the Court has not attached a label to the standard of review applicable to challenges to military regulations alleged to infringe fundamental civil rights,[13] the "rational basis" test most closely describes the Court's approach in practice. Cases considered by the Court in the last decade have included the military's criminal punishment (three years at hard labor) of an officer's spoken protest of the Vietnam War on the ground that the speech was "conduct unbecoming an officer" (*Parker* v. *Levy*, *supra*); the military's ban of speakers from military bases because of the political content of their speech (*Greer* v. *Spock*, *supra*); and the military's imposition of prior restraints on petitions to congressmen in the interest of maintaining order and discipline (*Brown* v. *Glines*, *supra*). None will doubt that civilian society may not be so regulated. Yet in each of these cases, the military regulations were upheld without any judicial "balancing of interests" or "strict scrutiny" of the asserted military interests.

Brown v. *Glines* most clearly exhibits the nature of this unique standard of review. There, the Air Force regulation at issue forbade the circulation of petitions by soldiers on a military base without approval of the base commander, who was authorized to suppress the distribution of material that he judged would endanger the " 'loyalty, discipline, or morale of members of the Armed Forces' " (444 U.S. at 350 (citation omitted)).

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[13] Indeed, it bears noting that the Court has expressly disavowed the utility of employing labels for the standards it applies in cases of this sort. *Rostker* v. *Goldberg* 453 U.S. at 69-70. We use the "rational basis" label not out of any conviction that a name is required, but only to make clear that petitioner's reliance (Br. 24-29) on concepts such as "strict scrutiny" and "compelling governmental interest" has no bearing in the military context.

The regulation had been enforced against a soldier who had solicited signatures on petitions to congressmen, complaining about the Air Force's grooming standards. The court of appeals invalidated the regulation on the grcund that it was overbroad and allowed commanders to suppress "'virtually all controversial written material'" (444 U.S. at 353 (citation omitted)).

This Court reversed. Although prior restraints on civilian speech may be justified only by the most certain evidence of immediate peril to the nation (see, *e.g.*, *New York Times Co.* v. *United States*, 403 U.S. 713 (1971) (per curiam)), the Court in *Glines* engaged in no balancing, no weighing of interests. To the contrary, the Court recognized that "[l]oyalty, morale, and discipline are essential attributes of all military service," and held simply that "[s]peech *likely to interfere* with these vital prerequisites for military effectiveness therefore can be excluded from a military base" (444 U.S. at 357 n.14, 354 (emphasis added)). The only caveat added by the Court was that the regulation of such expression must "restrict speech no more than is *reasonably necessary* to protect the substantial governmental interest" (*id.* at 355 (emphasis added)).

Thus, rights that are fundamental in civilian society and that can be abridged only in the most compelling situations may be curtailed in the military if their exercise is "likely to interfere" with the maintenance of good order or the instilling of discipline in military personnel. Petitioner's claim must be evaluated in the light of this unique standard.[14]

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[14] Until the instant case, the only circumstances in which the Court has been called upon to consider the application of the Free Exercise Clause to members of the Armed Forces have been the conscientious objector cases. In those cases, the Court has unequivocally held that conscientious objector status is a matter of legislative grace, and not a constitutional right. See, *e.g.*, *United States* v. *MacIntosh*, 283 U.S. 605, 623-624 (1931), overruled on other grounds, *Girouard* v. *United States*, 328 U.S. 61 (1946); *In re*

2. Yet another factor must inform this Court's review of petitioner's challenge to the Air Force uniform regulation. Not only are the civilian precedents used to evaluate Free Exercise claims inapplicable because of the special nature of the military, but, in addition, the Court must afford a significantly heightened degree of deference to professional military judgments concerning the need for a particular regulation promulgated to establish and maintain a disciplined and well-ordered military force. As the Court recently noted in *Chappell* v. *Wallace*, 462 U.S. 296, 301 (1983), the character of this deference was "summed up" in *Orloff* v. *Willoughby*, 345 U.S. 83, 93-94 (1953):

> "[J]udges are not given the task of running the Army. * * * The military constitutes a specialized community governed by a separate discipline from that of the civilian. Orderly government requires that the judiciary be as scrupulous not to interfere with legitimate Army matters as the Army must be scrupulous not to intervene in judicial matters."

This extraordinary deference is rooted partly in the express constitutional commitment of the governance of the nation's Armed Forces to the President and Congress

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Summers, 325 U.S. 561, 572 (1945); *Gillette* v. *United States*, 401 U.S. 437, 461-462 (1971); *Johnson* v. *Robison*, 415 U.S. 361, 383-386 (1974). For purposes of the instant case, the most significant fact about the conscientious objector cases is that, as one commentator has noted, "[t]he Supreme Court's approach in *Gillette* and *Robison* clearly indicates that *Sherbert*'s strict scrutiny analysis for free exercise claims does not apply to activities arising from Congress's power to raise and support armies." Folk, *Military Appearance Requirements and Free Exercise of Religion*, 98 Mil. L. Rev. 53, 68 (1982). As we shall demonstrate in the following sections of this brief, if religious scruples against the waging of war are insufficient to overcome the "Government's interest in procuring manpower necessary for military purposes" (*Gillette*, 401 U.S. at 462), they are surely insufficient to justify disobedience to the disciplinary requirements so essential to accomplishment of the military mission.

(U.S. Const., Art. I, § 8, and Art. II, § 2, Cl. 1)[15] and partly in the inability of civilian judges to determine the impact upon discipline that judicial second-guessing of command decisions might occasion. In *Gilligan* v. *Morgan*, 413 U.S. 1, 10 (1973), the Court observed:

> [I]t is difficult to conceive of an area of governmental activity in which the courts have less competence. The complex, subtle, and professional decisions as to the composition, training, equipping, and control of a military force are essentially professional military judgments * * *.

Accord *Rostker* v. *Goldberg*, 453 U.S. at 64-69.

Chief Justice Warren has echoed this view, noting that judicial deference to military judgments in areas affecting discipline has been the tradition of our country since its founding (Warren, *The Bill of Rights and the Military*, 17 N.Y.U. L. Rev. 181, 187 (1962) (emphasis added)):

> It is now indisputable that the tradition of our country, from the time of the Revolution until now, has

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[15] Judicial deference to military judgments seems particularly appropriate in light of the Framers' deliberate consideration of where best to repose civilian authority over the military. See, *e.g.*, *The Federalist No. 26*, at 168 (A. Hamilton) (H. Syrett & J. Cooke ed. 1962):

> The idea of restraining the legislative authority, in the means of providing for the national defence, is one of those refinements, which owe their origin to a zeal for liberty more ardent than enlightened * * *. [C]onfidence must be placed somewhere * * * [and] it is better to hazard the abuse of that confidence, than to embarrass the government and endanger the public safety, by impolitic restrictions on the Legislative authority.

See also *Rostker* v. *Goldberg*, 453 U.S. at 70-71 (citations omitted) (" '[I]t is the primary business of armies and navies to fight or be ready to fight wars should the occasion arise.' The responsibility for determining how best our Armed Forces shall attend to that business rests with Congress * * * and with the President.").

> supported the military establishment's broad power to deal with its own personnel. *The most obvious reason is that courts are ill equipped to determine the impact upon discipline that any particular intrusion upon military authority may have.* Many of the problems of the military society are, in a sense, alien to the problems with which the judiciary is trained to deal.

See also *Brown* v. *Glines*, 444 U.S. at 357 ("Because the right to command and the duty to obey ordinarily must go unquestioned, this Court long ago recognized that the military must possess substantial discretion over its internal discipline.").

The Court has employed the same reasoning in the *Feres* line of cases. See *Feres* v. *United States*, 340 U.S. 135 (1950). Most recently, in *United States* v. *Shearer*, No. 84-194 (June 27, 1985), the Court refused to permit the mother of a deceased soldier to maintain an action under the Federal Tort Claims Act alleging negligence on the part of the military in failing to prevent another soldier's fatal assault and battery of her son. Such a suit, the Court stated, "would involve the judiciary in sensitive military affairs at the expense of military discipline and effectiveness." *Shearer*, slip op. 7. The Court further explained (*id.* at 6):

> To permit this type of suit would mean that commanding officers would have to stand prepared to convince a civilian court of the wisdom of a wide range of military and disciplinary decisions; for example, whether to overlook a particular incident or episode, whether to discharge a serviceman, and whether and how to place restraints on a soldier's off-base conduct.

3. In sum, this case involves judgments made by military professionals concerning the training of military personnel. It is the judgment of those military professionals that regulations dictating uniformity of dress will instill the discipline, morale, and esprit de corps essen-

tial to the accomplishment of the military mission. Consistent with established limits on judicial review of such military decisions, this Court's role is, first, to determine whether it is "likely" that exceptions to the military's uniform requirements will interfere with the military interests advanced by the Air Force. *Brown* v. *Glines*, 444 U.S. at 354. If so, the Court must also determine whether the scope of the uniform regulation is "reasonably necessary" to achieve those interests. *Id.* at 355. As we demonstrate below, these two inquiries must, in the circumstances of this case, be answered in favor of the Air Force. At that point, the Court's role is at an end, and petitioner's challenge to the uniform regulation must be rejected.

B. Exceptions To Military Uniform Dress And Appearance Standards Are "Likely To Interfere" With The Maintenance Of Discipline, Morale, And Esprit De Corps.

There can be no serious doubt that uniform dress and appearance standards serve the military interests of maintaining discipline, morale, and esprit de corps. In *Kelley* v. *Johnson*, 425 U.S. 238 (1976), the Court rejected a policeman's claim that a county dress and appearance code violated his right of free expression under the First Amendment and his guarantees of due process and equal protection under the Fourteenth Amendment. The Court noted that the "overwhelming majority" of police departments have uniform requirements, legitimately directed at promoting "a desire for the esprit de corps which such similarity [in appearance] is felt to inculcate within the police force" (425 U.S. at 248). The Court found this rationale for the dress code "so clear" that it held that the district court had correctly dismissed the complaint (425 U.S. at 247-248). Accord *Marshall* v. *District of Columbia Government*, 559 F.2d 726, 728 (D.C. Cir. 1977) (upholding police force uniform appearance regulations against Free Exercise chal-

lenge on ground that "requirements are directly related to discipline, uniformity and to esprit de corps").

If it is "so clear" that uniformity serves to inculcate discipline, morale, and esprit de corps in police departments, it follows a fortiori that uniformity serves the same purposes in the nation's "uniformed services."[16] This conclusion is supported by virtually all professional military personnel (see *Joint Service Study*, at III-13, App. E, at A35-A39), by centuries of military experience in this and other countries,[17] by social

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[16] Indeed, the court of appeals in *Kelley*, which had overturned the police dress code, did so based upon its view that "the 'unique judicial deference' accorded by the judiciary to regulation of members of the military" was not applicable to a county's regulation of its police force. *Kelley*, 425 U.S. at 246 (citation omitted).

[17] See, *e.g.*, H. Semmes, *Portrait of Patton* 8 (1955) (emphasis added)):

> Patton was a great stickler for discipline in uniform and in saluting because he knew that in these small things he would develop a hold on the men and officers working under him. * * * He often said, "If you can't get them to salute when they should salute, and wear the clothes you tell them to wear, how are you going to get them to die for their country? Often you will order them to carry out a dangerous task that may mean their lives. Be sure you have your hand on them in all things and they will be dependable when the heat is on."
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> * * * * *
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> It is human to resent being told what to wear and how to wear it. Insistence on strict compliance with uniform regulations breaks down the barrier of resentment to discipline, possibly *more than anything else*. If men strictly obey the regulations about wearing the uniform, they can be held truly disciplined men. Discipline is the background of all military operations.

See also G. Patton, Jr., *War As I Knew It* 336, 362, 403-404 (1975). The same theme was sounded in W. Slim, *Defeat Into Victory* 542-543 (1956):

> At some stage in all wars armies have let their discipline sag, but they have never won victory until they made it taut again; nor will they. We found it a great mistake to belittle the importance of smartness in turn-out, alertness of carriage,

scientists,[18] and by common sense. Indeed, in the court of appeals, petitioner conceded that "the wearing of a uniform *is essential* to the maintenance of military discipline and *esprit de corps*" (Br. for Appellee 21 (emphasis added)), and he does not maintain otherwise in this Court.[19]

This concession is fatal to petitioner's argument (Br. 17, 18) that the only interest of the Air Force in enforcing A.F.R. 35-10 is enforcement itself. On the contrary, the authorities we have cited clearly demonstrate that enforcement is important not merely for its own sake, but as a means to the undeniably critical end of molding soldiers into an effective fighting force. This

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cleanliness of person, saluting, or precision of movement, and to dismiss them as naive, unintelligent parade-ground stuff. I do not believe that troops can have unshakable battle discipline without showing those outward and formal signs, which mark the pride men take in themselves and their units and the mutual confidence and respect that exists between them and their officers.

The Joint Service Study Group also considered military practices in foreign countries. It concluded that successful military forces that have not insisted upon uniformity of appearance are aberrations and that such organizations "represent special cases where a particular overriding factor (usually an immediate external threat) welded cohesion and esprit." *Joint Service Study*, at III-19.

[18] See, *e.g.*, *Dress, Adornment, and the Social Order* 127 (M. Roach & J. Eicher ed. 1965) (emphasis in original):

> Basically, the uniform was invented as a means to indicate the relationship of an individual to a group * * *. So many are the uses of uniforms today that we tend to forget the origin of the word (uni-form: one form, all alike). *By wearing the uniform of a particular group, a man shows by his clothing that he has given up his right to act freely as an individual but must act in accordance with and under the limitations of the rules of his group.*

[19] Petitioner also did "not challenge the discretion of the Air Force to choose the method it believes will best ensure the discipline and *esprit de corps* that it *rightfully deems essential* to the maintenance of an effective military force" (Br. for Appellee 8 (emphasis added)).

Court recognized the same point in *Brown* v. *Glines*, 444 U.S. at 354 (quoting *Schlesinger* v. *Councilman*, 420 U.S. 738, 757 (1975) (emphasis added)):

> Military personnel must be ready to perform their duty whenever the occasion arises. * * * *To ensure that they always are capable of performing their mission promptly and reliably*, the military services "must insist upon a respect for duty and discipline without counterpart in civilian life."

Because enforcement of a uniform requirement is directly related to the maintenance of discipline, morale, and esprit de corps, it follows that recognizing any exceptions to the uniform dress and appearance standards prescribed by A.F.R. 35-10 is "likely to interfere" with accomplishment of the military mission. By definition, a uniform requirement cannot coexist with exceptions to it.

C. The Scope Of The Air Force's Uniform Regulation Is Reasonably Necessary To Protect The Military Interests At Stake.

Having conceded that uniforms are essential to the maintenance of military discipline and esprit de corps, petitioner is forced to argue that the scope of the Air Force's uniform regulation is unreasonably broad and that the Air Force could allow yarmulkes to be worn without adverse consequences to the military interest in discipline and morale. Virtually all of petitioner's arguments represent precisely the sort of second-guessing of professional military judgments that this Court has refused to countenance in the past.

1. The chief premise of petitioner's overbreadth argument is his characterization of the yarmulke as an " 'unobtrusive' * * * benign religious observance" that, in today's society, is no more than "slightly idiosyncratic apparel" (Br. 9 (citation omitted)). Petitioner supports his characterization of yarmulkes as "unobtrusive" by stating that they are "commonly seen and accepted"

on university campuses, city streets, and other public places (Br. 11).

The government has no quarrel with the proposition that, in civilian society, the wearing of a yarmulke is not an occasion for comment or is, at most, "slightly idiosyncratic" behavior. But petitioner asks this Court to take this unremarkable observation well beyond the context of civilian society. Petitioner's argument depends on the proposition that practices considered "unobtrusive" in civilian society—where individuality in dress is the rule rather than the exception—are equally "unobtrusive" in a military setting. The analogy will not work, for in the military there are no clothing options. Detailed regulations specify which garments may be worn and further specify how and when they must be worn. The smallest departure from these strict specifications *is* an occasion for comment. It is common knowledge, for example, that a soldier's failure to button a button on his tunic can result in a stern rebuke from his superior. Cf. H. Semmes, *Portrait of Patton* 7-8 (1955). In other words, a "slightly idiosyncratic" unbottoned tunic is *obtrusive* in the highly regulated military community.

Furthermore, the entire premise of petitioner's argument is subject to serious question. Petitioner takes as a given the "unobtrusiveness" of a yarmulke, and he assumes that it is "generally understood to be a form of religious observance" (Br. 11). But the testimony in this very case demonstrates that not everyone is familiar with yarmulkes, because petitioner's co-workers and patients occasionally asked him what he was wearing (J.A. 166-167). Although petitioner's answers may have satisfied those who inquired, others—particularly petitioner's military subordinates who might not think it appropriate to question their superior's dress—could easily assume that petitioner was deviating from the prescribed uniform regulations purely for reasons of personal preference having nothing to do with his religious beliefs.

Thus, it cannot be assumed that other soldiers with whom petitioner comes in contact would appreciate that he is engaging in an " 'unobstrusive' * * * benign religious observance" (Pet. Br. 9 (citation omitted)). See pages 42-43 & note 25, *infra*.

From the military perspective, therefore, it requires no great effort to imagine the conspicuousness of a piece of unconventional headgear. The wearing of a yarmulke is a visible and significant departure from prescribed standards. As previously explained, it is the judgment of military professionals that such departures tend to make the wearer special and distinctive, setting him apart from other soldiers whose absolute conformity with the uniform regulations serves to confirm their military commitment. The wearing of a yarmulke is a public assertion of individuality in a context in which professional military officers have come to the studied judgment that uniformity is the best and perhaps the only way of instilling the discipline and esprit de corps essential to the fulfillment of the military mission. In a word, professional military officers have concluded that the wearing of yarmulkes and similar departures from the prescribed uniform are "obtrusive," because they are in conflict with military goals and purposes. See, *e.g.*, J.A. 58-59, 61 (testimony of General Usher).

Thus, petitioner's characterization of yarmulkes as "unobtrusive" is, in effect, merely a restatement of his disagreement with the judgment of military officers on the importance of strict and punctilious adherence to uniformity. That is, petitioner's assertion that yarmulkes are "unobtrusive" ultimately reduces to his contention that the judgment of military officers on the importance of adherence to uniformity is unreasonable. Unfortunately for petitioner, that is not his determination to make.

2. The district court conceded that the Air Force's judgment was "based upon the experience of the Air Force in times of peace and in times of war" (Pet. App.

31a). But the district court was unwilling to rely on the Air Force's experience, stating that conclusions "based * * * on the personal beliefs and assumptions of Air Force officials"—even those with "expertise" in the area—"are inadequate to withstand constitutional scrutiny" (*id.* at 33a).[20] Petitioner, contending that the Air Force's judgment was not based on a "scientific study" (Br. 12), resurrects this unprecedented analysis.

Even if it were possible to validate the Air Force's judgment by psychological or sociological tests and studies (but see note 8, *supra*), the short answer to petitioner's argument is that it is neither constitutionally required nor appropriate to insist that the military perform clinical or empirical studies before it may enforce a regulation such as A.F.R. 35-10. The military is itself a profession, and its institutional judgments, especially those relating to discipline and morale, have been refined by centuries of practical experience. Those judgments possess independent dignity and are entitled, within their sphere, to more respect than the speculations of members of other professions unacquainted with the peculiar constraints of military life. This Court therefore should re-

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[20] The district court would have found the Air Force's judgment "supportable" if it had "been the product of an empirical study, psychological survey or the like" (Pet. App. 33a). We note that such a study has now been performed. See pages 10-15, *supra*. At the same time, however, it is important to stress that studies and surveys are not constitutionally required before the Military Departments may enforce regulations of the sort at issue in this case. Thus, the *Joint Service Study* is significant not because it fills a void found by the district court, but because it reaffirms the constitutional commitment to *Congress* of the power to "make Rules for the Government and Regulation of the land and naval Forces." U.S. Const. Art. I, § 8. In the exercise of that power, Congress may, of course, direct the military to study a particular issue. If it so chooses, Congress may go further, directing the military to take whatever action it deems appropriate in light of the study. It is quite a different matter, however, for the judiciary to refuse to accord deference to professional military judgments because a *court* thinks that a study would be desirable.

ject petitioner's request for judicial second-guessing of a decision of an admittedly military character merely because it lacks a "scientific"—*i.e.*, nonmilitary—basis. See *Chappell* v. *Wallace*, 462 U.S. at 302 (quoting *Gilligan* v. *Morgan*, 413 U.S. at 10); cf. *Parker* v. *Levy*, 417 U.S. at 763 (Blackmun, J., concurring) ("The subtle airs that govern the command relationship are not always capable of specification."). As the court of appeals observed, "the Air Force's judgment on this issue is entitled to deference because it is within its expertise and outside ours" (Pet. App. 19a-20a).

Moreover, the Air Force has persuasively explained why the particular military judgment at issue here is reasonably necessary to maintain discipline and morale. For example, the Air Force is plainly correct in concluding that the wearing of yarmulkes (or any religious garb not authorized by regulation) would set the wearers apart from military personnel who do not engage in such practices. It would make them a distinct class, the nature of which would not be based upon military distinctions, such as rank.[21] Petitioner loses sight of the fact that separateness generated by individual preferences—whether religious or otherwise—is precisely what the military seeks to deemphasize through its uniform regulations. Military entities are intended to function as units, and unit cohesion is possible only when the individuals habitually and willingly subordinate their personal tastes and interests to the purpose of the combat group. In sum, "idiosyncratic" practices that emphasize individuality are "functional[ly] and symbolic[ally] incompatib[le] with the 'specialized [military] society separate from civilian society.'" *Greer* v. *Spock*, 424 U.S. at 844 (Powell, J., concurring) (quoting *Parker* v. *Levy*, 417 U.S. at 743).

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[21] This conclusion is shared by petitioner's authorities, who, discussing the historial roots of the tradition of wearing yarmulkes, observed that "uncovering the head was the custom of the Gentiles * * *. Covering the head thus served as a means of identification and a *barrier against assimilation.*" J.A. 228 (emphasis added).

3. Petitioner also argues (Br. 13-15) that wearing a yarmulke has no adverse consequences for military discipline or morale, because "no one objected to his wearing a yarmulke and, other than a few inquiries by interested co-workers or patients, it caused little comment." Petitioner's contention is both inaccurate and irrelevant. First, it was exactly the fact of complaints from other military personnel that led to the order requiring petitioner to conform to the uniform regulation. In the highly formal atmosphere of a military court-martial, petitioner's unconventional headgear led to a complaint by an officer of the court. J.A. 15. Moreover, the Air Force disclosed to petitioner that, in 1978, the hospital commander received a complaint from a non-commissioned officer, who stated that "several of the younger Air Force members were upset that they were required to live up to standards of dress and [g]rooming while Capt. Goldman was not." J.A. 22.

More important, the military is not required to demonstrate in each individual case that a departure from uniform standards has caused a breakdown in discipline or morale before it may enforce its regulations. See *Cornelius* v. *NAACP Legal Defense & Educational Fund, Inc.*, No. 84-312 (July 2, 1985), slip op. 20-21; *Perry Education Ass'n* v. *Perry Local Educators' Ass'n*, 460 U.S. 37, 52 n.12 (1983) (citing *Greer* v. *Spock*, *supra*).[22]

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[22] Accordingly, petitioner's alternative contention (Br. 12) that the Air Force's judgment must be supported by "actual experience" before it can provide a basis for the regulation is totally unsupported by precedent. Apparently, petitioner would require the military to permit a practice and allow it to continue until it actually caused a degeneration of discipline and morale. The Court has never imposed such a requirement on the Armed Forces. For example, "[s]peech *likely* to interfere with [morale and discipline] * * * can be excluded from a military base." *Brown* v. *Gline*, 444 U.S. at 354 (emphasis added). See also *Greer* v. *Spock*, 424 U.S. at 840 ("[N]othing in the Constitution * * * disables a military commander from acting to avert what he perceives to be a clear danger to the loyalty, discipline, or morale of troops * * * un-

Significantly, Congress has taken note of the serious consequences that may flow from a general relaxation of uniform dress and appearance standards. In its investigation of the causes of serious riots that took place aboard two aircraft carriers during the Vietnam War (the U.S.S. *Constellation* and the U.S.S. *Kitty Hawk*), a special subcommittee of the House Armed Services Committee concluded that the Navy's authorization of individual variations in uniform dress had been a contributing factor in the breakdown of discipline on the carriers (House Comm. on Armed Services, *Report by the Special Subcomm. on Disciplinary Problems in the U.S. Navy*, H.A.S.C. 92-81, 92d Cong., 2d Sess. 17682 (1973)):

> The current relaxation of the standards of appearance for Navy men has caused a lessening in the pride that some sailors take in their appearance and, thus, in their service.
>
> Admittedly, Z-57 and subsequent clarifying messages concerning the standards of appearance, were not designed to permit Navy personnel to become sloppy and slovenly in their appearance and grooming. Nonetheless, such has been the effect.
>
> [T]he subcommittee received clear and irrefutable evidence that men of the naval service do not present the smart appearance that once was their unique trademark.
>
> While this has undoubtedly been as a result of individual abuse of relaxed regulations, it has, in fact, caused a service-wide problem for all Navy personnel. Until such time as there is insistence on clear-cut standards for a smart appearance while in

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der his command."). In truth, petitioner's "actual experience" requirement would be totally unworkable, because it would be virtually impossible for the military to show a clear cause-and-effect relationship between relaxation of its uniformity standards and a breakdown in discipline and morale (see note 8 *supra*). Furthermore, the showing that petitioner would require could only be made *after* the military—and hence the nation—would have suffered irreparable harm.

> the uniform of the United States Navy, the general morale and discipline will be adversely affected.

These legislative findings are entitled to great weight (see *Rostker* v. *Goldberg*, 453 U.S. at 72), and they negate petitioner's claim that the Air Force must demonstrate an actual breakdown in discipline attributable to him before it may require his compliance with the uniform regulation.

4. Although petitioner does not stress the argument, it bears noting that the military interests at stake are no less weighty simply because petitioner was serving in a noncombat position at a hospital. The Court recognized this point in *Brown* v. *Glines*, 444 U.S. at 356-357 n.14 (citations omitted):

> [T]hose restrictions necessary for the inculcation and maintenance of basic discipline and preparedness are as justified on a regular base in the United States, as on a training base, or a combat-ready installation in the Pacific. Loyalty, morale, and discipline are essential attributes of all military service. Combat service obviously requires them. And members of the Armed Services, wherever they are assigned, may be transferred to combat duty or called to deal with civil disorder or natural disaster.

As the *Joint Service Study* recognized, the alternatives to such flexibility in assignments are unacceptable (*id.* at III-16 to III-17):

> The services could assign individuals granted [dress and appearance] exceptions only to duties and locations where military requirements would *never* impinge upon their religious tenets. Alternatively, the services could agree to assign such an individual only to duties for which his exception would not, under normal circumstances, create a safety hazard or impinge upon his ability to accomplish the mission * * *.
>
> To adopt either of these approaches would complicate further the assignment processes of all the

> services by limiting the career fields into which people could be placed and by reducing flexibility within the personnel system.
>
> In a more general sense, adoption of assignment restrictions of this type would, in essence, create two classes within the military: the majority, subject to all the demands the military makes on its members (including worldwide assignment and the possibility of serving in a combat environment), and a visible minority, exempt from certain of the more onerous demands of the institution but eligible for all of its benefits. The impact of such an arrangement on the attitude of both groups can only be speculated, but it seems likely that the overall effect would harm military esprit de corps.

Furthermore, even if noncombat servicemembers were never transferred to combat positions, military history teaches that the need to instill instinctive obedience to command remains the same (Hirschhorn, *supra*, 62 N.C. L. Rev. at 226 (footnotes omitted; emphasis added)):

> The purpose of noncombat personnel is to provide reliable support services to combat units. * * * If the support components of an army are not as subject to the commander's will as are the combat components, they may withdraw whenever they find their situation to be too far from home, too dangerous, or not remunerative enough. * * * The commander whose supporting personnel were under military obligations of obedience and attendance had an advantage over an opponent with only an army of combat troops. * * * *Regardless of the particular duties he performs, the noncombat serviceman is a means to the same end as the combatant. He may not face as much danger, but the armed forces have the same reason to induce him to comply willingly with the requirements of his job.*

Thus, the subordination of the individual essential to the military mission can be attained only if it is a constant throughout the servicemember's career; inculcation

of the discipline necessary to fight a war cannot await the outbreak of hostilities. In the military setting, it is simply unrealistic and antithetical to the goals of the mission to allow "minor" deviations from absolute requirements, regardless of the function a particular servicemember performs. Congress itself recognized this fact in its investigation of the incidents aboard the U.S.S. *Constellation* and the U.S.S. *Kitty Hawk* (H.A.S.C. 92-81, *supra*, at 17683):

> Military discipline demands nothing less than immediate response to orders. The need for this immediacy is obvious in situations where lives are at stake. To demand a similar response during routine operational [or] "minor matters is essential to proper training for emergency situations and appropriate responsiveness to commands which may be given in wartime.

5. Petitioner makes much (Br. 21-22) of the district court's finding that the allowance of religious exceptions to the uniform standards might "enhance the effectiveness of the Air Force" by making it appear to be a "less rigid, more humane institution" (Pet. App. 31a). It is difficult to imagine a judgment more outside the realm of judicial competence than the degree of "rigidity" and "humanity" deemed necessary by a Military Department. Petitioner's contention (Br. 21) that religious exemptions would be "desirable" is thus totally irrelevant to the issue in this case.

In any event, the evidence upon which petitioner relies, even if it were remotely relevant to this Court's consideration of the question presented, does not support petitioner's argument. Dr. Samuel Levinson, a retired Army psychologist, did testify that, in his personal opinion, religious exemptions from the uniform requirements would be "beneficial" to the Air Force (J.A. 134). But the basis for his opinion serves only to confirm the Air Force's

judgment that deviations from the prescribed uniform would emphasize the individuality of servicemembers, even though it is the Air Force's considered judgment that, in the military setting, individuality must be subordinated to the group mission. Dr. Levinson testified that dress and appearance exceptions "would reflect the acceptance of pluralism, of flexibility, of [humaneness] in the system, of recognizing that there are reasonable differences * * * and *it is okay to be somewhat different*" (J.A. 136 (emphasis added)). Dr. Levinson's testimony therefore supports the Air Force's central premise, which is that the wearing of yarmulkes and other religious garb is by no means "unobtrusive," but would instead draw attention to "certain differences" (J.A. 134) among military personnel.

Dr. Levinson, of course, disagreed with the Air Force personnel experts who testified at trial and who participated in the *Joint Service Study*.[23] Dr. Levinson believed that an Air Force organized along different lines—one that did not stress uniformity and that was not concerned with whether military personnel "buttoned three buttons or four or wore some little bit here or there on the uniform as part of some identification, some identity issue"—would be more effective. J.A. 141.[24] Whatever the merit

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[23] Dr. Levinson was not himself a personnel expert, nor had he ever had any command experience. J.A. 137-139.

[24] For example, Dr. Levinson described Admiral Elmo Zumwalt's relaxation of Navy regulations so as to permit beards as a "brilliant psychological move" (J.A. 128). When confronted with the fact that the Navy has since repudiated that policy, Dr. Levinson stated only that he viewed the change as "a function of the conservative wave that has come along with the conservative politics of the Reagan administration" (J.A. 137); he had no "empirical" or "clinical" studies of his own to support his views on the desirability of the initial Navy experiment (*ibid.*). Similarly, Dr. Levinson dismissed as unproven congressional findings that lax enforcement of

of Dr. Levinson's position, it unquestionably involves fundamental and far-reaching policy choices of extraordinary importance to the structure of the military. This Court, however, has never taken it upon itself to determine, as petitioner urges, whether a more "flexible, pluralistic, and humane" Air Force could better accomplish that service's unique task. Cf. *Kelley* v. *Johnson*, 425 U.S. at 248 ("Neither this Court, nor the Court of Appeals, nor the District Court is in a position to weigh the policy arguments in favor of and against a rule regulating hairstyles as a part of regulations governing a uniformed civilian [police] service."). In sum, petitioner's contention that the Air Force itself would benefit from accommodating his religious request simply has no bearing on the proper resolution of this case.

6. Petitioner also objects (Br. 39-40) to the Air Force's concern that soldiers who are required to conform absolutely to the service's dress and appearance regulation are likely to resent what they may perceive as unequal and favored treatment for those in petitioner's position. Indeed, petitioner goes so far as to suggest (Br. 8; see also *id.* at 39-40) that for the Air Force to take such potential resentment into account is tantamount to "the now discredited World War II justification for racial segregation in the military"—that is, that a bigoted person's resentment of a black soldier's race is not a permissible basis upon which to deny the black soldier his rights.

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uniform regulations had led to disruptions aboard the U.S.S. *Kitty Hawk* (see pages 37-38 *supra*). J.A. 141-142.

In any event, Dr. Levinson's views on military accommodation have in fact been tested. The Army, on an experimental basis, permitted members of the Sikh religion—a sect with a strong military tradition and, in this country, relatively few members—to wear mandated items of religious apparel (turbans, unshorn hair, beads, and religious bracelets). The Army was forced to terminate this exception when "it became [apparent] that it might have to grant significant numbers of additional exceptions that would cause a detrimental impact on the Army's ability to perform its mission." Folk, *Military Appearance Requirements and Free Exercise of Religion*, 98 Mil. L. Rev. 53, 62 (1982).

The weakness of petitioner's position is demonstrated by his resort to this strained analogy. The Air Force is not here arguing that Orthodox Jews—or members of any other religion—should be treated differently because of their religion. Rather, the Air Force seeks only to treat Orthodox Jews exactly as it treats all other soldiers. It is petitioner who seeks favored status by asking to be relieved of one of the burdens of military service—strict adherence to uniform requirements—in order to satisfy a personal, nonmilitary (albeit religious) preference. Compare *United States* v. *Lee*, 455 U.S. 252, 264 n.3 (1982) (Stevens, J., concurring) (*Thomas* and *Sherbert* may be viewed "as a protection against unequal treatment * * * for the members of the religious sect"), with *Braunfeld* v. *Brown*, 366 U.S. 599, 608-609 (1961) (exemption for Jewish merchants from Sunday-closing law might provide them with a competitive advantage over merchants unable to claim a similar exemption). In these circumstances, it was not at all unreasonable for the Air Force to consider, among numerous other factors, the resentment of soldiers who would not themselves be entitled to any exemptions from the burdens of military service. See J.A. 41-42; see also *Joint Service Study*, at III-11 to III-12.[25]

D. Acceptance Of Petitioner's Argument Either Would Spell An End To Uniformity Or Require The Military To Engage In Impossible And Impermissible Line Drawing.

1. In addition to his emphasis on the "unobtrusiveness" of yarmulkes, petitioner stresses that "[t]here is nothing

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[25] As General Usher pointed out, the problem of resentment is particularly acute because of petitioner's status as an officer. "[I]f you allow this kind of a deviation on the part of an individual, particularly by an individual who is an officer and who is meant to be the epitome of a standard, the example, then it is very difficult then to enforce other kinds of standards or the dress standard itself on other people that are members of the Air Force by supervisors and commanders." J.A. 42.

intrinsically desirable about wearing a skullcap or any other religiously mandated apparel" (Br. 17). Hence, petitioner argues that "there is no reason to presume" that religious exemptions from the uniform requirement "would be invoked by many servicemen" (*ibid.*). Contrary to petitioner's argument, however, his is not an isolated case. Indeed, this case is but one of several recent or pending cases in which persons have argued that the military must grant exemptions from uniform requirements in order to accommodate a variety of ritual, religious practices.[26] In addition, many requests for exemptions from the uniform requirements have been denied without litigation. We are advised by the Army that it has received and denied requests for religious exemptions to its uniform requirements that would permit the wearing of turbans, unshorn hair, beards, swords, ankle length skirts, dreadlocks (long, braided hair worn by Rastafarians), and kum kums (red dots worn on the forehead by Hindus). Exemptions have been requested from members of the Christian, Jewish, Muslim, Sikh, Hindu, Rastafarian, and Native American faith groups. See *Joint Service Study*, at I-14, I-36 n.19. Nor have requests for exemptions been limited to isolated, individual cases. For example, subsequent to the court of ap-

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[26] See, *e.g.*, *Khalsa* v. *Weinberger*, 759 F.2d 1411 (9th Cir. 1985), pet. for reh'g pending (turban, unshorn hair, and beard, Sikh); *Sherwood* v. *Brown*, 619 F.2d 47 (9th Cir.), cert. denied, 449 U.S. 919 (1980) (turban, Sikh); *M. Bitterman* v. *Sec'y of Defense*, 553 F. Supp. 719 (D.D.C. 1982), appeal pending, No. 83-1177 (D.C. Cir.) (yarmulke, Orthodox Judaism); *B. Bitterman* v. *Weinberger*, dismissed, No. 83-3288 (D.D.C. Feb. 3, 1983) (unshaven beard and yarmulke, Orthodox Judaism); *Kirschenbaum* v. *Sec'y of Defense*, dismissed, No. 84-1302 (D.D.C. Apr. 24, 1984) (yarmulke, Orthodox Judaism); *Taylor* v. *Alexander*, No. C-1-80-417 (S.D. Ohio filed Aug. 22, 1980) (unshorn hair, Christian). See also *United States* v. *Haywood*, 19 M.J. 675 (A.F.C.M.R. 1984) (refusal to wear tight-fitting clothing, Muslim); *Shy* v. *Alexander*, dismissed, No. CV-LV-84-141-RDF (D. Nev. May 31, 1984) (refusal to salute flag or female officers, Shiloh-Christian).

peals' decision in this case, 51 members of a Pentecostal church in Junction City, Kansas, all of whom had been involuntarily separated from the Army because of their religious practices concerning apparel, requested that those practices be accommodated. Among other things, they asked that men be permitted to keep their shirtsleeves buttoned to the wrist at all times, not be required to go bare-chested, and not be required to wear shorts in the presence of females. The females in the group requested permission to be excused from wearing fatigue trousers or other types of men's clothing. See App., *infra*, 1a-3a. It is clear, therefore, that petitioner's case is not unique.

Despite these example of the extent of the problem confronting the Armed Forces, petitioner contends that the Air Force "did not show * * * that if a religious exemption were available it would be claimed by enough servicemen to have any impact on the military" (Br. 7). Petitioner's assertion is incorrect. The Air Force introduced at trial U.S. Dep't of the Army *Pamphlet No. 165-13-1, Religious Requirements and Practices of Certain Selected Groups: A Handbook Supplement for Chaplains* (1980) [hereinafter cited as *Chaplains' Handbook*].[27] This handbook, prepared "in order to provide information useful for Chaplains on the beliefs and practices of certain religious groups" (*id.* at i), discusses seven groups of religions, with 47 subgroups, many of which have traditions or requirements involving ceremonial religious garb. The 47 subgroups were selected for inclusion in the handbook out of the more than 1,200 religious denominations in the United States on the basis of the likelihood that military chaplains would encounter members of the selected groups in the performance of their duties (*id.* at ii).

Thus, the varieties of religious dress about which the Air Force testified in the district court (see pages 5-6, *supra*) are not limited to obscure sects, of academic in-

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[27] We have lodged a copy of the *Chaplains' Handbook* with the Clerk of the Court.

terest only. Rather, the empirical premises of the *Chaplains' Handbook* establish that, in all probability, Armed Forces Chaplains will have dealings with military personnel whose religious practices include wearing one's hair drawn to a tuft (a "sikh"); shaving the head; not shaving any body hair; marking the face with white clay lines or red dots; wearing various forms of headgear, including turbans and skullcaps; wearing robes of various colors and shapes; wearing jodhpurs; refusing to wear form-fitting clothing; refusing to wear clothes that do not cover the face; and a myriad of other variations.[28]

2. It should be obvious that the number and variety of potential exemptions, if granted, would spell an end to uniformity—the raison d'etre of the regulation at issue. No speculation is required to conclude that members of the various religious sects identified in the *Chaplains' Handbook* would indeed regard a uniform exception as "desirable" (Pet. Br. 17) and seek to exercise it—especially when many of the religious practices identified in the *Chaplains' Handbook* are regarded by their adherents as mandatory. As the Court noted in *Heffron* v. *International Society for Krishna Consciousness*, 452 U.S. 640, 653 (1981), those entitled to engage in a particular practice will " 'in all probability' " do so if prohibitions against it are lifted.

It is also worth noting that the *Chaplains' Handbook* studied only the apparel requirements mandated by centrally-organized religions. Not surprisingly, however, idiosyncratic beliefs of particular churches or individuals within churches likewise have led to religiously-motivated requests for exemptions from the uniform requirements. See *Taylor* v. *Alexander*, No. C-1-80-417 (S.D. Ohio filed Aug. 22, 1980) (personal belief that New Testament requires unshorn hair); cf. *Thomas* v. *Review Board*, 450 U.S. at 715-716 ("[T]he guarantee of free exercise is not

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[28] The findings of the *Chaplains' Handbook* were reiterated in the *Joint Service Study*, App. C, at A6 to A25.

limited to beliefs which are shared by all of the members of a religious sect."). And the possibility that individuals would seek to indulge or create such idiosyncratic beliefs is even more likely in the military than in civilian life, because of the natural inclination many servicemembers might feel to seek out ways in which to resist the uniformity and regimentation imposed by authority. See note 17, *supra*.[29]

3. At the same time, it is equally obvious that any attempt by the military to follow the suggestion of the district court (Pet. App. 33a) to allow religious exemptions only for members of religions who wish to wear skullcaps, or petitioner's apparent suggestion (Br. 35) to allow religious exemptions only for the apparel worn by members of established, conventional religions,[30] while

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[29] In a similar vein, Congress recognized the potential difficulty of "how to distinguish between practices that stem from genuine faith and practices that could be used simply as a challenge to military discipline or as an excuse for failure to comply with legitimate orders." H.R. Rep. 98-1080, 98th Cong., 2d Sess. 294 (1984). Congress directed the Joint Service Study Group to answer this question. The Study Group, based upon the military's "[e]xperience with conscientious objector claims since development of the present constitutional standard of what is religious," concluded that it would be virtually impossible to distinguish sincere from insincere claims. *Joint Service Study*, at I-27 to I-28.

[30] Although the facts of this case concern only yarmulkes, petitioner argues for a decision that would require the military to grant exceptions for all "small, religiously mandated deviations from the standard military uniform" (Br. 35). "Small" deviations are, of course, only "small" in the eyes of the beholder. Moreover, even assuming the possibility of objective agreement on what constitutes a "small" deviation, size alone does not ensure that the exemption would have no disruptive impacts. Although the yarmulke itself is regarded by the Air Force as a disruptive deviation, one can imagine much "smaller" religiously-mandated deviations—for example, kum-kums (red dots worn on the forehead by Hindus) or the dreadlocks worn by Rastafarians (see page 44, *supra*).

If, by "small," petitioner is merely recasting his claim for a standard of "unobtrusiveness," his argument stands on no better footing. Any attempt to distinguish articles of religious dress on

denying exemptions to members of other religious groups, would raise substantial questions under the Establishment Clause. "The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another." *Larson* v. *Valente*, 456 U.S. 228, 244 (1982); see also *Cruz* v. *Beto*, 405 U.S. 319, 322 (1972) (per curiam) (prison officials may not limit chapel privileges to the members of "conventional" denominations). It may fairly be assumed that the Krishna monk's saffron robes are as important to him as is the yarmulke or an unshorn beard to an Orthodox Jew. Thus, there is no constitutional room to grant petitioner's request while denying others.

E. The Air Force Regulation At Issue Withstands Constitutional Scrutiny Even Under The Standard Of Review Applicable To Free Exercise Claims In The Civilian Sector.

Petitioner devotes a substantial portion of his brief (23-36) to an attack on the allegedly "pernicious" argument advanced by the government in *Heckler* v. *Roy*, cert. granted, No. 84-780 (June 17, 1985). We shall be filing a reply brief in *Roy*, and we will serve a copy of that brief on petitioner's counsel. In the meantime, we reiterate, as we explained at the outset (see pages 20-24, *supra*), that the "compelling governmental interest" and "least restrictive means" inquiries that petitioner urges upon the Court have no applicability in this military case. In these circumstances, it makes no difference whether those inquiries are approached from an individual or a program-

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the basis of their degree of "obtrusiveness" would inevitably and improperly favor established religions whose dress conventions are "commonly seen and accepted in today's [civilian] society" (Pet. Br. 11). If a yarmulke or a clerical collar is less "obtrusive" than a turban, it is not for any reason intrinsic to the apparel, but rather because the conventions of certain religions are simply better established in American society. In any event, as we have already demonstrated (see pages 31-33, *supra*), a yarmulke is itself "obtrusive" in the context of military society.

matic standpoint, and the legal analysis applicable to *Roy* need not be considered here.

For the sake of completeness, however, it should be made clear that the insistence of the Air Force on petitioner's compliance with A.F.R. 35-10 is constitutionally valid even under the mode of analysis he urges. First, it is scarcely open to debate that the military's interest in maintaining discipline, morale, esprit de corps, image, and teamwork, all for the purpose of ensuring that the nation is protected by a fighting force capable of achieving its military mission, is a governmental interest of the highest order. See *Bitterman* v. *Sec'y of Defense*, 553 F. Supp. 719, 724 (D.D.C. 1982), appeal pending, No. 83-1177 (D.C. Cir.). Second, it is obvious that no less restrictive alternative is available to accomplish that interest. Whether the government's interest is viewed programmatically or whether instead one analyzes the impact of granting an exemption to a particular individual, the result in this case is the same. Viewed from an individual perspective, even a single exemption would subject the government to the risk that a servicemember would not, without hesitation or question, be willing to follow his commander's orders in other circumstances. Adherence to orders, and hence discipline, is possible only when commanders are able to insist upon it, and expect that it will be followed, in all aspects of military life. When the national security is at stake, it is asking too much to assume that military personnel, in *their* discretion, will correctly decide what orders are essential to the security of the country and what orders are not. Even for one individual, therefore, an exemption from absolute norms is an unacceptably high price for the government to pay.

When viewed programmatically, it is equally obvious that the entire purpose of uniform standards would be defeated if individuals were allowed exemptions. To disregard the government's programmatic interests in this case in favor of exceptions made on a case-by-case basis

would make a mockery of the military's compelling interest in uniformity. This point is addressed most directly in *United States* v. *Lee*, 455 U.S. 252, 259-260 (1982). There, a member of a small religious group—the Old Order Amish—sought an exemption from the social security tax on employers on free exercise grounds. This Court recognized that such a claim could not be analyzed on the basis of the particular claimant, or his religious group, alone. Rather, the question was whether the government's interest could be upheld in the face of "myriad exceptions flowing from a wide variety of religious beliefs" (*id.* at 260). Similarly, the feasibility of an exemption from military dress and grooming requirements must be judged in light of the "myriad exceptions" to those requirements that would be sought. The district court made no attempt to show how its yarmulke exception would fit into the overall scheme of military dress and grooming. Clearly, it would not, and thus the government's programmatic interest in uniformity cannot be satisfied by any less restrictive means. See *Bitterman*, 553 F. Supp. at 726.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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DECEMBER 1985

APPENDIX

FAITH TABERNACLE
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September 28, 1984

Senator Aspin/Honorable Casper Weinberger:

According to the Army Time, August 21, 1984, you have directed The Department of Defense to conduct a study on religious policies that conflict with army regulations, and come up with a policy that is equitable and across the board.

I, Leonard Westberg, Pastor of Faith Tabernacle United Pentecostal Church, Junction City, Kansas do hereby regretfully submit to you the following facts.

I have pastored Faith Tabernacle in Junction City (adjacent to Fort Riley) for over thirteen years. I have had much conflict with the army over our religious convictions.

The list of young men and women that are listed below are just a few of the young men and women who have been chaptered out of the army because of religious convictions. These are the ones that chose to stay in Junction City after they were discharged, but there are many more who chose to go back home, so I have no record of them.

We are a strict fundamentalist group who love God, but we are intensely patriotic also, and feel an obligation to serve this great country as well as serving God. Our conflict with the army is usually in two areas. The first of which is the covering of the body. We believe that God

hates nakedness (Rev. 3:18, Gen. 3:21), and therefore it is very important to us to cover our bodies. In the list below, most of the young men were given a chapter five, or a chapter thirteen discharge because they asked not to roll their sleeves above their elbows. Bear this in mind, they were in uniform completely except they ask not to roll up their sleeves. They carefully explained to their superiors that it was a religious conviction, and respectfully requested to be allowed to leave their sleeves to the wrist. In most cases they were given a direct order to roll them up, given an article fifteen for disobeying a direct order, disciplined, and some of them were court martialed before they were discharged.

There has been a conflict, also, in that these young men asked not to be required to take off their fatigue shirts, or to wear shorts during physical training when there were females present.

The names marked with an asterisk below are young ladies who were given a chapter five, or a chapter thirteen discharge because they had asked permission to wear their uniforms that included a skirt, and ask to be allowed not to wear the fatigue trousers, because we do not believe in a lady wearing mens clothing.

It is impossible to describe the mental anguish and the humiliation these men and women have suffered because of a calloused disregard of their religious beliefs, and the harsh application of army discipline, and even harassment. In defense of the United States Army there have been a very few commanders who risked themselves being disciplined and took a chance on being denied advancement when they saw the sincereity and dedication to duty of these young men and women, and took advantage of Army Regulation 670-1, which give local commanders permission to establish uniform policies to their command.

These young men and women do not use drugs, alcohol, nor tobacco, and are holding down responsible jobs in the community. They are sincere, dedicated, hard working, and an asset to society. Their service to the United

States Army was invaluable, the cost of training them, and the interruption of their Army careers would have a staggering monetary loss if it could be evaluated.

I offer myself and all of these listed for further communication, either by letter, telephone or appointment.

It is with great confidence in your integrity, and with respect to your office that I submit these following fifty-one names.

Sincerely yours,

/s/ L. E. Westberg
L. E. WESTBERG

LEW:do

Enclosure: List of Names

[Enclosure omitted]

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